IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 276

THE SECURITY FLOUR MILLS COMPANY,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE

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STATEMENT

Written consent having been obtained from both parties, this brief is filed pursuant to paragraph 9 of Rule 27 of the Court's rules.

Amici curiae are attorneys for the plaintiff in a suit for refund of income and excess-profits taxes brought by Russell-Miller Milling Co., a Delaware corporation, against Arthur D. Reynolds, Collector of Internal Revenue for the District of Minnesota, now pending for trial as Civil No. 688 in the United States District Court for the District of Minnesota, Fourth Division. At issue is the right of the plaintiff, a miller, to reduce taxable income for taxable years ended August 31, 1935, and August 31, 1936, by the amount of re-

imbursements made by ~~the plaintiff in 1937~~ to vendees to whom flour had been sold prior to January 6, 1936, at prices which included taxes imposed under Section 9 of the Agricultural Adjustment Act of 1933 (Act of May 12, 1933, c. 25, 48 Stat. 31, 35) in respect of processing of the wheat contained in such flour, such taxes having been impounded in court pending determination of validity of the Act in *United States* v. *Butler*, 297 U. S. 1, and thereafter returned to the plaintiff.[1]

In the petition for certiorari in the pending cause it is pointed out (pp. 12-18) that the question at issue is one of widespread interest in the milling industry, since invalidation of the Act confronted millers generally with the same problem. In confirmation, the following summary statement is made of some of the facts which it is anticipated will be established upon trial of the Russell-Miller case:

On July 9, 1933, the effective date of the processing tax, Russell-Miller increased the selling prices of its flour to reflect such tax; on January 6, 1936, the date of the *Butler* decision, it made corresponding reductions in such prices. During the intervening period a printed form was customarily employed in making flour sales. Beginning May 1, 1935, the form contained a provision reading in part as follows:

> TAXES: The prices named in the contract include the processing taxes as now imposed by the United States on the processing of the commodities used in the manufacture of the products covered by this contract * * *.
>
> Any decrease in the processing taxes as now or hereafter imposed by any legislative or administrative branch of the United States shall inure to the benefit

[1]The plaintiff did not commence doing business until the end of 1935, when a reorganization was consummated whereby the plaintiff took over the property and affairs of a predecessor North Dakota corporation which theretofore had had the same name. However, for brevity the change in corporate entities is disregarded herein, the two companies together being treated as constituting only one corporation.

of the Buyer, if as and when the benefit of such decrease has been actually realized and secured by the Seller, and shall be credited against the contract prices named in this contract to the extent—and only to the extent, that the grain used in the manufacture of the product covered by this contract is milled after the decrease in the processing tax takes effect, and to the extent that the Seller is thereby definitely relieved from the processing tax * * *.

All processing taxes imposed in respect of wheat processed on and before April 30, 1935, were paid to the Collector. Collection of such taxes in respect of wheat processed between May and November, 1935, inclusive, was enjoined by a succession of orders issued by the District Court in proceedings instituted against the Collector. Restraint of collection was conditioned, among other things, upon deposit of the tax in issue in the registry of the court or in banks. The orders provided that in the event invalidity of the tax were established the moneys deposited would be returned to Russell-Miller or, in some of the orders, be disposed of as the court might direct, including "distribution of said moneys * * * pursuant to the plaintiff's offer to make * * * restitution thereof". On March 17, 1936, the deposits, less clerk's fees, were returned to Russell-Miller.

During July, 1933, Russell-Miller set up on its books an account entitled "Tax a/c Processing". At the end of that month and of each succeeding month up to and including December, 1935, it credited the account with the amount of tax imposed in respect of wheat processed during such month. When at the end of the succeeding month the tax became due and was paid, or with respect to May to November, 1935, inclusive, was deposited, the account was debited. When the deposited moneys were returned in March, 1936, the account was credited with the amount received.

In January, 1937, Russell-Miller transmitted a form letter

to each vendee to whom flour processed after April 30, 1935, had been shipped between May 1, 1935, and January 5, 1936, inclusive, in fulfillment of purchases consummated by use of the sales form employed on and after May 1, 1935. Therein reimbursements were proposed on all flour milled, shipped, and delivered between May 1, 1935, and January 5, 1936, inclusive, "covered by bona fide signed contracts carrying the so-called tax clause". Inserted in the letter was a figure representing the "reimbursement due you" on the above basis. With the letter went a form of "Release Agreement", which recited that the reimbursement was "in bona fide settlement" of the written sales agreement or as reimbursement for the amount of processing taxes imposed but not paid, included in such sale prices". Reimbursements were made as proposed and were debited to an account "Processing Tax Reimbursements"; on April 23, 1937, the balance in that account was transferred to "Tax a/c Processing" by debiting the latter and crediting the former.

Though there was doubt until after April 23, 1937, whether Russell-Miller was under legal liability to make reimbursements to vendees, there being then no decisions interpreting the so-called "tax clause" used in the form of written sales contract or clauses similar thereto, Russell-Miller as a practical matter at all times regarded itself as under obligation to pay out the returned deposits, and with this in mind it kept the returned deposits set aside in the form of United States Treasury bills until the form letter to vendees was dispatched in January, 1937.

In no twelve-month period ending August 31 in any of the ten years 1930 to 1939, inclusive, did Russell-Miller mill less than 1,906,781 barrels of flour or more than 2,568,7[illegible], the average being 2,097,865.6. The number of barrels milled in each of the twelve-month periods ended August 1, 1935, and August 31, 1936, was 1,967,586 and 2,048,472, respective-

ly. Russell-Miller's net income or net loss for its taxable years ended August 31 in each of the years 1930 to 1937, inclusive, for a taxable period of ten months ended June 30, 1938, and for a taxable year ended June 30, 1939, all as finally determined by the Commissioner of Internal Revenue for purposes of Federal income and excess-profits taxes, after eliminating all gains and losses upon the sale or exchange of capital assets, was as follows:

1930	$1,807,831.26
1931	1,687,617.08
1932	457,641.49
1933	827,835.56
1934	1,319,101.87
1935	1,814,508.99
1936	1,100,614.23
1937	($1,168,218.19)[2]
1938	281,415.95
1939	462,372.30

Russell-Miller kept its books and filed its returns on the accrual basis of accounting.

ARGUMENT

Full discussion will no doubt be accorded Section 43 of the Revenue Act of 1934 in the briefs of the contending parties, and on this assumption we content ourselves, so far as this provision is concerned, with a few brief observations.

Neither the prevailing opinion below (*Commissioner* v. *Security Flour Mills Co.* (C. C. A. 10th), 135 F. (2d) 165) nor the dissenting opinion in *Helvering* v. *Cannon Valley Milling Co.* (C. C. A. 8th), 129 F. (2d) 642, suggests that

[2]Russell-Miller's return for 1937 showed a net loss of $321,802.84. While the Commissioner made an audit, no audit-report was issued, presumably because any changes made would not be sufficient to wipe out the loss. To the net loss shown by the return is added $846,415.35, the amount of reimbursements made in 1937 up to April 23, 1937, thus reflecting the Commissioner's contention that the reimbursements are deductible only in the year of payment. The figures for 1935 and 1936 are of course without deduction of either the reimbursements or of the processing taxes deposited during the injunctive period.

the Commissioner's contention secures as clear a reflection of income as does the taxpayer's; indeed, it is quite plain that the opposite is true and that distortion is achieved by the one and avoided by the other. Yet the obvious desirability of clear reflection was sacrificed, in these opinions, in the thought that it was incompatible with the principles of annual tax accounting and that Section 43 was not sufficient to afford relief.

We pass for the moment the point of incompatibility, and consider only the impact of Section 43. The opinions in question do not seek to justify the thrusting aside of Section 43 on the ground that what is said in that provision does not support the taxpayer's position; on the contrary, they give implied if not express acknowledgment—what is in any event manifest—that Section 43, read as written, authorizes the deduction in the taxable year rather than at another time, since otherwise there is distortion rather than clear reflection. Instead they turn from the statute to what the committees of the Congress said about it while in process of enactment. And because they conceive that what is there said is, when read narrowly, inconsistent with what the statute itself provides, they carve the latter to fit the former.

Such procedure is clearly offensive to doctrine both sound and settled. At least in the absence of shocking absurdity or flagrant injustice, search for legislative purpose outside the words of a statute has long been deemed permissible only where there is obscurity or ambiguity. The intent of the lawmaker "is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." *Thompson* v. *United States*, 246 U. S. 547, 551. See also *Ruggles* v. *Illinois*, 108 U. S. 526, 534. Perusal of committee reports is an aid to interpretation, but it presupposes a need for in-

terpretation; it is admissible only "to solve doubt and not to create it." *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 589.

Had enactment of Section 43 been effected without the accompaniment of committee reports, no one would have been troubled as to the meaning of Section 43 or have questioned the unassailability of the taxpayer's position under that provision. The majority below, and it seems also the dissenter in the *Cannon Valley* decision, did not profess to doubt the applicability of Section 43 on the basis of what is therein stated; such doubt as they had arose only when they forgot the statute and began to read the less discriminating language of the reports. They did not resolve doubt by adhering to the rules; they begot doubt by violating the rules.

Even so, one might almost be disposed to indulge the infraction were the committee reports themselves so free from ambiguity as incontrovertibly to establish that the words of the statute, intelligible and sensible as they are both in phraseology and in effect, were patently the result merely of unfortunate selection and that the lawmakers meant something different from what they said. The *fact* is otherwise, however. True it is—and this is the sole ground upon which the majority opinion below is rested—that the reports mention the making in one year of disbursements relating to several years. But the reference is not given as exclusive or as indicative of the operative limits of the statute, but simply as a statement of the character of problem out of which arose the "necessity" for the provision. There is no reasonable basis for doubting that this is so, but were it otherwise the doubt would be dispelled by what precedes the reference; for there it is said that the provision is merely an extension to new fields of the theory of another provision which, in the case of a loss, authorizes its deduction in a year other than the year in which it was sustained, where necessary to clear

reflection. Manifestly there is no foundation for the argument that Section 43 embraces, not cases involving the shifting of deductions and credits from one year to another, but only cases involving such shifting from one year to two or more other years; certain it is in any event that there is in the committee reports—even were resort thereto permissible—no such unequivocal injunction as to justify maiming the statute.

The majority opinion below seems to assume that the taxpayer's right to prevail is dependent on applicability of Section 43. We think this error, and are of the view that the taxpayer would be entitled to prevail had that provision never been enacted.

In a broad view the issue is one that strikes much deeper than mere interpretation of Section 43. The problem is in the nature of the recurrent one of drawing a line (see *Harrison* v. *Schaffner*, 312 U. S. 579, 583), and involves tracing the division between two principles basic to income-tax law. The one principle relates to the practical necessity, incident to production of a "regular flow of income" (*Burnet* v. *Sanford & B. Co.*, 282 U. S. 359, 365), of measuring taxable income at periodic cut-offs, and the other, equally vital, relates to the like practical necessity of achieving maximum clear reflection of taxable income by the avoidance of distortion. While there are instances where inevitably they impinge on one another, both principles have parts to play, and no reasonable person would contend that either one must always abdicate the field the moment the other appears.

Manifestly a balance of convenience must be struck in the light of the reasonable claims of both principles. In this aspect, we submit, achievement of clear reflection of income should not be sacrificed except as it works substantial inter-

ference with ascertainment and production of revenue on the basis of fixed periods.

In the *Sanford* case, *supra*, there was such interference. In the instant matter the contrary is true. The facts and circumstances in the *Sanford* case are so patently wide of those at bar that they need not be recounted here, and it is presently sufficient to point out only that at issue in this cause is determination of income for the earliest taxable period touched by the facts immediately pertinent to such determination, and there is here no occasion to carry back items either of income or deduction to years whose accounts have been cast up and in respect of which there has intervened the social policy of repose evidenced by the statutes of limitation. Cf. *Elliot Co.* v. *Commissioner*, 45 B. T. A. 82, 87-93. Indeed, so far as interference with periodic ascertainment and production of revenue is concerned, the case is in no essential different from the great mass of controversies which regularly flow through the tribunals to which the Congress has given power of adjudication; like statement may not be made of the *Sanford* case.

Pertinent too in this connection is the character of the adjustment sought to be made. What the taxpayer seeks is for practical and perhaps also for technical purposes the proper reflection of an adjustment in sales price, as distinguished from deduction of a business expense; the provision in the tax clause under which the vendee-reimbursements were made is regarded in the business world simply as an agreement to reduce the price of the article sold (see Paton, Accountants' Handbook, 2nd ed., p. 1124). It would be quite preposterous to say that it constitutes a substantial interference with the orderly administration of the revenue laws to relate the price-refunds to the sales in respect of which they were made, particularly where, as here, they were consummated well within the period given for the assertion of

additional tax claims.[3]

The fact is that every argument the respondent might conceivably advance in refutation of the taxpayer's position in this cause could be made with redoubled persuasion in the case of refunds of so-called excessive profits which war contractors are currently called upon to make to the United States, and they would still fall far short of carrying conviction, by the Treasury's own confession. Such refunds are made without measuring-stick and often without contract; yet as to them the Treasury acknowledges the soundness of the position which the taxpayer here advances. In a letter of September 16, 1941, to the Chairman of the Naval Affairs Investigating Committee of the House of Representatives the Under Secretary said in part (see 423 Commerce Clearing House, par. 6359):

> It is the view of the Department that under the circumstances presented any refunds to the Government resulting from adjustments of such excessive profits serve merely to reduce the original contract price of the materials furnished and the services rendered. Accordingly, in computing income for Federal income tax purposes, the original contract price should be reduced by the amount of any refund of such excessive profits applicable thereto, provided that the original contract is modified in writing so as to indicate the reduced price. The necessary adjustment should be made in the taxable year or years in which the original contract price, with respect to which the refund is applicable, is includible in income. Only the net amount received will therefore be reflected in income.

See opinion of the Comptroller General, No. A-83460.

What has been said serves to emphasize that fundamental-

[3]Sight must not be lost of the fact that the adjustment here sought relates to isolated, non-recurring transactions. The linking of a price-refund to the sale in respect of which it is made is ordinarily not of significance, from the standpoint of clear reflection of income, if it falls into the category of the usual year-end transactions which every business regularly experiences; clear reflection is achieved by consistent treatment year after year. Quite different is the result when the transaction, as at bar, is altogether extraordinary.

ly the dispute is over proper accounting. As such it is of a class with that involved in *Dobson* v. *Commissioner,* October Term 1943, No. 44, decided December 20, 1943; indeed, it is even more clearly an accounting problem than was that in the *Dobson* case. Such a problem, as the *Dobson* decision points out, is a fact-problem "for the Tax Court to determine." The Tax Court has made such determination in this case (*Security Flour Mills Co.* v. *Commissioner,* 45 B. T. A. 671), concluding (p. 681), following what it had already done in *Cannon Valley Milling Co.* v. *Commissioner,* 44 B. T. A. 763, "that the payments made to the vendees should be allowed as a deduction in computing the taxpayer's income for 1935, since they related to the sales made in that year and did not relate to the sales made in the later period." As was true in the *Dobson* case, so here "There is no statute law to the contrary". And since there is plainly "a rational basis" for the conclusion reached by the Tax Court, there was at bar no pervading error of law upon which the Circuit Court of Appeals could base a reversal. Accordingly, the Tax Court's decision should stand.[4]

Respectfully submitted,

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[4]Though obiter, the Tax Court said (p. 679) that the taxpayer was not "legally obligated" to reimburse its customers. There is doubt as to the correctness of the decisions cited in support of this statement. See Smith v. Sparks Milling Co., 219 Ind. 576, 39 N. E. (2d) 125, a soundly-reasoned decision.

p. 2.

SUPREME COURT OF THE UNITED STATES.

No. 276.—October Term, 1943.

The Security Flour Mills Company, Petitioner, *vs.* Commissioner of Internal Revenue. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 28, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals has held[1] that the Board of Tax Appeals erred in deciding[2] that the petitioner was entitled, in reporting its income tax for the year 1935, to deduct payments made by it in 1936, 1937, and 1938. Because of a conflict of decision[3] we granted certiorari.

The petitioner, which conducts a flour mill, reports its net income on the accrual basis. As a first domestic processor of wheat it was subject to the processing tax levied under the Agricultural Adjustment Act of 1933. In the early months of 1935 it paid processing taxes, and claimed, and was allowed, the amount so paid as a deduction from gross income in its federal income tax return for 1935. The amount thus paid is not involved.

Petitioner instituted a suit to enjoin the collection of processing taxes, and obtained a temporary injunction enjoining further collection on the condition that *pendente lite* it file information returns and pay the amount of the tax into a depository. From May 1 to December 31, 1935 petitioner so paid $93,000 and accrued over $9,000 additional upon its books for processing tax for the last month. It also accrued about $1,000 as a reserve for possible increases in taxes earlier paid. On January 6, 1936, the taxing provisions of the Agricultural Adjustment Act were held unconstitutional by this court. Certain of the petitioner's vendees attempted to intervene in the injunction suit and to have impounded moneys returned to them. Petitioner resisted and the court denied

1 135 F. 2d 165.

2 45 B. T. A. 671.

3 Helvering *v.* Cannon Valley Milling Co., 129 F. 2d 642.

the intervention and made an order directing the depository to pay to the petitioner the impounded money, which was done February 28, 1936.

The petitioner set up on its books a suspense account covering the items above mentioned under the title "Reserve for Processing Tax, Claims, etc." The petitioner refunded various sums to its customers, totaling over $45,000 in 1936, 1937, and 1938 to reimburse customers for processing tax included in the sales price of flour sold them in 1935 and not paid to the Collector of Internal Revenue as processing taxes. In its 1935 tax return petitioner deducted from gross income the total of the amounts impounded and accrued but not paid the Collector in the year 1935 as accrued tax liability. The Commissioner found a deficiency by disallowing the petitioner's deduction for taxes accrued but not paid in 1935.

The propriety of the claimed deduction depends upon the construction of Sections 23(a), 41 and 43 of the Revenue Act of 19~~43~~.[4] 34 Section 23 permits the deduction of ordinary and necessary expenses "paid or incurred during the taxable year in carrying on any trade or business". Section 41 declares the general rule that the taxpayer's annual accounting period shall be the fiscal year or calendar year, depending upon the method of accounting regularly employed, provided such method clearly reflects income. Section 43, on which the petitioner relies, provides:

> "The deductions and credits provided for in this title shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period." . . .

It is settled by many decisions that a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent, and this principle is fully applicable to a tax, liability for which the taxpayer denies, and payment whereof he is contesting.[5] Here the petitioner, in figuring its costs and its sales price to consumers, added the amount of the processing tax, but it collected its purchase price as such and designated no

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[4] c. 277, 48 Stat. 680, 688, 694.

[5] See Dixie Pine Products Co. v. Commissioner, No. 84, Oct. Term, 1943, where this rule of law was reaffirmed and applied by the Board of Tax Appeals, the Fifth Circuit Court of Appeals, and by this court, and cases cited.

part of it as representing the tax. The petitioner received the purchase price as such. Its tax liability, if any, to the United States did not differ from other debts. Since it denied liability for, and failed to pay, the tax during the taxable year 1935, it was not in a position in its tax accounting to treat the Government's claim as an accrued liability. As it admittedly received the money in question in 1935 and could not deduct from gross income an accrued liability to offset it, the receipt, it would seem, must constitute income for that year.

Petitioner nevertheless insists that Section 43 of the Revenue Act, which requires that deductions be taken for the taxable year in which the amount was paid or accrued, creates an exception applicable to this case by its concluding clause, "unless in order to clearly reflect the income the deductions or credits should be taken as of a different period." In short, the petitioner's position is that the Commissioner and the Board of Tax Appeals are authorized and required to make exceptions to the general rule of accounting by annual periods wherever, upon analysis of any transaction, it is found that it would be unjust or unfair not to isolate the transaction and treat it on the basis of the long term result. We think the position is not maintainable.

The Revenue Act of 1921, in Sections 214(a)(6) and 234(a)(4)[6] authorized the Commissioner to allow the deduction of losses in a year other than that in which sustained when, in his opinion, that was necessary clearly to reflect income. The qualifying clause of Section 43 was first added as Section 200(d) of the Revenue Act of 1924.[7] The reports of both House and Senate Committees concerning this change said:

"The proposed bill extends that theory to all deductions and credits. The necessity for such a provision arises in cases in which a taxpayer pays in one year interest or rental payments or other items for a period of years. If he is forced to deduct the amount in the year in which paid, it may result in a distortion of his income which will cause him to pay either more or less taxes than he properly should."[8]

From these reports it is clear that the purpose of inserting the qualifying clause was to take care of fixed liabilities payable in

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[6] c. 136, 42 Stat. 227, 240, 255.

[7] 43 Stat. 253, 254.

[8] H. R. 179, 68th Cong., 1st Sess., pp. 10, 11; S. R. No. 398, 68th Cong., 1st Sess., pp. 10, 11.

fixed installments over a series of years. For example, a tenant would not be compelled to accrue, in the first year of a lease, the rental liability covering the entire term nor would he be permitted, if he saw fit to pay all the rent in advance, to deduct the whole payment as an expense of the current year. But we think it was not intended to upset the well understood and consistently applied doctrine that cash receipts or matured accounts due on the one hand, and cash payments or accrued definite obligations on the other, should not be taken out of the annual accounting system and, for the benefit of the Government or the taxpayer, treated on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or to the taxpayer.

The question is not whether the Board, within its discretion, made a determination of fact. Compare *Dobson* v. *Helvering*, 320 U. S. —.) It is rather whether, as matter of law, the Board misconstrued the extent of the power conferred by the Revenue Act.

"All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt."[9]

The rationale of the system is this: "It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation."[10]

This legal principle has often been stated and applied.[11] The uniform result has been denial both to government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying

[9] Burnet v. Sanford & Brooks Co., 282 U. S. 359, 363.

[10] *Id.*, p. 365.

[11] See e. g. Lucas v. Ox Fibre Brush Co., 281 U. S. 115, 120; Burnet v. Thompson Oil & Gas Co., 283 U. S. 301, 306; Woolford Realty Co. v. Rose, 286 U. S. 319, 326; Tait v. Western Maryland Ry. Co., 289 U. S. 620, 624; Brown v. Helvering, 291 U. S. 193; Guaranty Trust Co. v. Commissioner, 303 U. S. 493, 498.

the accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount.[12]

But the petitioner urges that Section 43 has altered the rule so that a hybrid system, partly annual and partly transactional, may, within administrative discretion, be substituted for that of annual accounting periods. It urges that the change was due to the desire of Congress to prevent distortion of true income. This must mean distortion of true income, not of a given year, but, in the light of ultimate gain from a series of transactions over a period of years, growing out of, or in some way related to, an initial transaction in the taxable year. The very section on which petitioner relies, however, reiterates the adherence of Congress to the system of annual periods of computation.

As we said in *Dixie Pine Products Co. v. Commissioner, supra,* referring to a section identical with Section 43 now under consideration, "The provisions of the Revenue Act of 1936 worked no significant change over earlier Acts respecting the permissible basis of calculating annual taxable income."

We are of opinion that the purpose of the language which Congress used was not to substitute, whenever in the discretion of an administrative officer or tribunal such a course would seem proper, a divided and inconsistent method of accounting not properly to be denominated either a cash or an accrual system.

The judgment is affirmed.

Mr. Justice DOUGLAS and Mr. Justice JACKSON are of opinion that the case is governed by *Dobson v. Helvering,* 320 U. S. —, and that the judgment should, for the reasons therein stated, be reversed.

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[12] See the cases cited Notes 5, 9 and 11.